



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

anticipation of increased business in return.¹⁶ And, while properly allowing for differences in the cost of carrying articles of varying value,¹⁷ the public service law is coming more and more to condemn rates graduated according to what it is worth while to the patron to pay,¹⁸ or according to the purpose to which the identical service is to be put.¹⁹ Consequently, if this law is to develop consistently, it would seem that neither the sociological nor the economic advantages of encouraging suburban communities²⁰ should justify the accommodation of their peculiar necessities by any modification of rates not in proportion to some difference in the cost of service.²¹ However, although the railroad adopting such a policy may not at present be condemned by the law,²² yet the position seems to be clear that this is a discrimination against other localities and in favor of a particular class which should not be ordered by the state.²³

THE STATUS OF A STOCKHOLDER. — The doctrine that the assets of a corporation constitute a "trust fund" for the benefit of its creditors had its origin in a *dictum* of Judge Story,¹ and was adopted by a large majority of the American courts.² The doctrine was applied to two essentially different classes of cases. It led the courts to say that a corpo-

cannot be done "to an unreasonable degree." *Interstate Commerce Commission v. Louisville & N. R. Co.*, 118 Fed. 613. See *Union Pacific Ry. Co. v. Goodridge*, 149 U. S. 680, 690, 13 Sup. Ct. 970, 974.

¹⁶ *Hilton Lumber Co. v. Atlantic Coast Line R. Co.*, 136 N. C. 479, 48 S. E. 813; *Crescent Coal Co. v. Louisville & N. R. Co.*, 143 Ky. 73, 135 S. W. 768. *Contra*, *Hoover v. Pennsylvania R. Co.*, 156 Pa. St. 220, 27 Atl. 282.

¹⁷ *Interstate Commerce Commission v. Delaware, L. & W. Ry. Co.*, 64 Fed. 723.

¹⁸ *Tift v. Southern Ry. Co.*, 138 Fed. 753; *Philadelphia & R. Ry. Co. v. Interstate Commerce Commission*, 174 Fed. 687. See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 1224, 1388; 23 HARV. L. REV. 648. But see *Interstate Commerce Commission v. Chicago, Great Western Ry. Co.*, 141 Fed. 1003, 1015.

¹⁹ *Baily v. Fayette Gas-Fuel Co.*, 193 Pa. St. 175, 44 Atl. 251; *Postal Cable Tel. Co. v. Cumberland Tel. & Tel. Co.*, 177 Fed. 726; *In the Matter of Restricted Rates*, 20 Interst. C. Rep. 426.

²⁰ *Cf. Chicago, R. I. & P. Ry. Co. v. Interstate Commerce Commission*, 171 Fed. 680. The federal court held that the commission should not regard the relative economic or commercial advantages of different localities in fixing rates. This was reversed by the Supreme Court, on the ground, however, that the commission had not in fact attempted to do so. 218 U. S. 88, 30 Sup. Ct. 651. See *Brewer v. Central of Georgia Ry. Co.*, 84 Fed. 258, 268. But *cf. Southern Ry. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429; *State v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 N. W. 60.

²¹ See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 1395, 1396; 20 HARV. L. REV. 523.

²² See BEALE & WYMAN, RAILROAD RATE REGULATION, § 529.

²³ On this ground, the Interstate Commerce Commission held itself powerless to restrain the subsequent contraction of the zone within which commutation tickets were sold. *Sprigg v. B. & O. R. Co.*, 8 Interst. C. Rep. 443. *Cf. Galveston Chamber of Commerce v. Railroad Commission*, 137 S. W. 737, 745, 748 (Tex. Civ. App.); *Lake Shore & M. S. R. Co. v. Smith*, *supra*.

¹ *Wood v. Dummer*, 3 Mason (U. S.) 308.

² "Ever since the case of *Sawyer v. Hoag*, 7 Wall. 610, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund . . ." *Handley v. Stutz*, 139 U. S. 417, 427, 11 Sup. Ct. 530, 534. See 9 HARV. L. REV. 481.

ration could not prefer, in the payment of its obligations, those creditors who were also stockholders.³ It also furnished a reason why a corporation could not release subscribers to its capital stock after creditors had made advances relying thereon.⁴ It soon appeared, however, that the doctrine went too far. It was readily admitted that there was no trust in a strict sense,⁵ and that nothing was to be gained in using the phrase metaphorically.⁶ Failing the reason, the result in the first class of cases shifted until it became well settled that a corporation, as well as an individual, could prefer whatsoever creditor it pleased.⁷ But in the second class of cases the decisions remained uniform that a subscriber to the capital stock of a corporation could not be released from his obligation to pay the par value of his stock so as to defeat creditors. As these decisions could no longer be based on the indefinite theory of a "trust fund," the courts sought sufficient legal reasons on which to base their results. The Minnesota court⁸ maintained that the doctrine of "fraud upon creditors" would sustain the cases and held that a corporation could therefore release its subscribers so as to bar subsequent creditors. A recent California case held that the release of a subscriber who was, by statute,⁹ made absolutely liable for the debts of the corporation, prevented subsequent but not prior creditors from reaching him. *Thomas v. Wentworth Hotel Co.*, 117 Pac. 1041.

But such fraud alone will not explain the liability of a stockholder in all its phases, for many courts have held that the subscriber cannot plead the fraud of the corporation, by which he was induced to subscribe, when sued by a creditor.¹⁰ Of necessity, because of the nature of a corporation, the relation of stockholder and corporation is *sui generis*, and creates rights and liabilities that cannot be explained on ordinary legal principles.¹¹ Although the relationship may be created without any formalities by the mere consent of the parties, when once entered into, duties to third parties result from which the original parties are powerless to relieve themselves, and this relationship may thus be likened to a status. A subscriber's duty to pay for his stock is more than a mere duty to pay a debt. For he cannot set off against it so as to defeat creditors obligations due to him from the corporation,¹² and the Statute of Limitations does not begin to run in his favor until a "call" has been made by the corporation.¹³ Although the courts have frequently spoken of "representations made by the subscriber to the creditors,"¹⁴ a true

³ See 15 HARV. L. REV. 409.

⁴ *Howley v. Upton*, 102 U. S. 314; *Flinn v. Bagley*, 7 Fed. 785. See 25 AM. L. REV. 940.

⁵ *McDonald v. Williams*, 174 U. S. 397, 19 Sup. Ct. 743.

⁶ *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127.

⁷ *Gould v. Little Rock, etc. Ry. Co.*, 52 Fed. 680; *New Hampshire Savings Bank v. Richey*, 121 Fed. 956. See 3 NORTHWESTERN L. REV. 115, 206. The rule in England is the same. *In re Wincham Shipbuilding, Boiler & Salt Co.*, 9 Ch. D. 322.

⁸ *Hospes v. Northwestern, etc. Co.*, 48 Minn. 174.

⁹ The statute was held constitutional in a previous case. *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 110 Pac. 942.

¹⁰ See 24 HARV. L. REV. 147; 22 *id.* 58.

¹¹ See 34 AM. L. REG. N. S. 448.

¹² *Sawyer v. Hoag*, 17 Wall. (U. S.) 610.

¹³ *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739.

¹⁴ "The creditors had a right to rely upon the fact that the subscribers to such stock

estoppel cannot be spelled out; and yet if a creditor knows of facts which give the stockholder a defense against the corporation, he cannot hold the subscriber.¹⁵ As the capital stock is not a liability of the corporation,¹⁶ a release of a subscriber would be a gift that creditors could have set aside. But this does not explain the cases where the release was given for a consideration, for there the stockholder, as in the principal case, can still be held by prior creditors. Perhaps the truest explanation is that "the courts have been doing legislative work" with a "more or less systematic judicial recognition of a demand of the commercial world."¹⁷

PREScriptive RIGHT OF PUBLIC AND OF FREEHOLD INHABITANTS TO FISH IN PRIVATE WATERS. — Several interesting questions of prescription were settled in two recent cases in the House of Lords. *Johnston v. O'Neill*, [1911] A. C. 552; *Harris v. Earl of Chesterfield*, [1911] A. C. 623. In the first, four¹ of the seven lords held that a right to fish in private waters cannot be acquired by the public by immemorial user. The decision of the majority is amply sustained by authority,³ though this is the first time the question has come before the House of Lords. A right of fishing in another's waters is a profit *à prendre*, a right to take a part of the produce of the land, as distinguished from an easement, which is a right without profit.⁴ A profit *à prendre* is incapable of creation except by grant or prescription.⁵ In the principal case there is no dominant estate to which a right by prescription could be attached,⁶ nor can a grant in gross be presumed, for the unorganized public is incapable of taking by grant.⁷ Thus the right, if any, must rest solely upon

have put into the treasury of the corporation, in some form, the amount represented by it." *Handley v. Stutz*, 139 U. S. 417, 430, 11 Sup. Ct. 530, 535.

¹⁵ *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231.

¹⁶ *Bridgman v. City of Keokuk*, 73 Ia. 42, 33 N. W. 355.

¹⁷ See 34 AM. L. REG. N. S. 448, 456.

¹ The Earl of Halsbury and Lords Macnaghten, Dunedin, and Robson. Lord Ashbourne, although not passing directly on the question, agreed with the majority, while Lord Shaw of Dunfermline intimated a contrary view. The Lord Chancellor dissented from the majority on the ground that the plaintiff had no title upon which to sue.

² An incidental question decided in the case is that a non-tidal lake of whatever size, even though actually navigable, does not belong as of right to the Crown. This follows the English rule as to rivers. See *Lord Leconfield v. Lord Lonsdale*, L. R. 5 C. P. 657, 665. But the rule as to large lakes had not previously been conclusively settled. See *Johnston v. O'Neill*, *supra*, 572. The rule here established is contrary to the general holding in the United States. *Percy Summer Club v. Astle*, 163 Fed. 1; *Sloan v. Biemiller*, 34 Oh. St. 492. But *cf. Adams v. Pease*, 2 Conn. 481. For a discussion of the opposite views, see 3 KENT COMM. 429, note a; 2 FARNHAM, WATERS AND WATER RIGHTS, § 368 c.

³ *Smith v. Andrews*, [1891] 2 Ch. 678; *Murphy v. Ryan*, Ir. R. 2 C. L. 143; *Albright v. Cortright*, 64 N. J. L. 330, 45 Atl. 634.

⁴ *Lloyd v. Jones*, 6 C. B. 81; *Peers v. Lucy*, 4 Mod. 362; *Cobb v. Davenport*, 33 N. J. L. 223.

⁵ *Grimstead v. Marlowe*, 4 T. R. 717; *Mellor v. Spateman*, 1 Saund. 340 c, note 3.

⁶ *Grimstead v. Marlowe*, *supra*; *Ordeway v. Orme*, 1 Bulstr. 183; *Merwin v. Wheeler*, 41 Conn. 14.

⁷ *Lloyd v. Jones*, *supra*; *Fowler v. Dale*, Cro. Eliz. 362; *Hill v. Lord*, 48 Me. 83.